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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 29, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petitions to Implement Section 706 of the Telecommunications Act of 1996
CC Dockets Nos. 98-11, 98-26, 98-32, 98-91, RM 9844

Dear Ms. Salas:

The attached letter was delivered to Chairman Kennard today and should be placed in the above-referenced files as an ex parte communication.

Sincerely,

Cronan O'Connell
Vice President of Industry Affairs
Association for Local Telecommunications Services
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July 29, 1998

Honorable William E. Kennard
Chairman, Federal Communications Commission
1919 M St., NW
Washington, D.C. 20054

Re: Petitions by Bell Atlantic, US West, Ameritech, and SBC to Implement Section 706 of the Telecommunications Act of 1996; CC Docket Nos. 98-11; 98-26; 98-32; and 98-91

Dear Chairman Kennard:

We very much appreciate your willingness and that of the Commission's staff to meet with us during the current NARUC meeting in Seattle to discuss the Commission's possible responses to the various section 706 petitions that have been filed by incumbent carriers. As we explain in more detail below, our fundamental concern is that neither section 272, nor the Commission's implementation of section 272 in its Non-Accounting Safeguards Order, were intended for or directed to the particular use now urged by the incumbents -- forbearance from section 251(c) for in-region data affiliates that comply with section 272.[1] Because it is so clear as a legal matter that neither the statute nor its implementing order can provide reliable policy guidance in the present context, we wish to outline here some of the considerations that need to be addressed in an NPRM if the Commission proposes to use section 272 compliance as a starting point in formulating a policy for forbearance from the regulation of in-region data affiliates.

The Need for Prompt Action by the Commission - Because section 272 and the Non-Accounting Safeguards Order do not address the specific policy issues implicated by the incumbents' proposed use of section 272 in their section 706 petitions, we think it is important for the Commission to hear the formal views of the emerging competitive local exchange carriers ("CLECs") as to how the current requirements of section 272 (which themselves are highly ambiguous, as we point out below) need to be made more specific and fine tuned in order to adequately protect competition in the high speed data services market which the incumbents seek to enter via data affiliates. We appreciate that you have expressed the need for the Commission to act promptly on the proposals

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[1] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd. 21905 (1996).

by the incumbents, and we agree. We are prepared to cooperate with you fully in formulating an expedited comment and reply schedule.

Critical Policy Concerns Implicated By a Separate In-Region Data Subsidiary -It is manifestly clear that section 272 and the Non-Accounting Safeguards Order were not intended to apply to the in-region provisioning of high speed loop services by an incumbent affiliate.[2] Thus, there are several important policy questions that need to be addressed by an NPRM which proposes to use section 272 compliance as a starting point, including, but not limited to, the following:

- Because incumbent affiliates at first will likely provision much higher volumes of high speed loop services than their competitors, the NPRM needs to raise the issue of how the Commission should determine whether differences between the OSS and other unbundled network elements ("UNEs") used by an affiliate, and those used by its competitors, are the result of discrimination or the legitimate result of differences in volumes.

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[2] Congress drafted section 272, and the Commission implemented this provision in its Non-Accounting Safeguards Order, with the clear understanding that the robust pro-competitive requirements of section 271 would already be in place before section 272 ever became applicable (aside from certain incidental interLATA services the RBOCs are authorized to implement immediately by section 271(g)). Thus, section 272 reflects Congress' conclusions about the manner in which an RBOC that has already substantially complied with section 251 should enter the mature, highly competitive long distance industry. Section 272 provides little if any policy guidance concerning the appropriate conditions that should apply to the very different scenario posed by the incumbents' proposals, under which incumbents that have not complied with section 251 could create in-region data affiliates that would be allowed to provision high-speed local loop services without also complying with section 251(c).

Indeed, the Commission has already ruled as a legal matter that nothing in section 272 confers such forbearance authority upon the Commission. BellSouth Petition for Forbearance from Application of Section 271 of the Communications Act of 1934, CC Docket No. 96-149, Order released February 6, 1998, at ¶¶ 22-23 ("... prior to their full implementation we lack authority to forbear [under section 10] from application of the requirements of section 272 to any service for which the BOC must obtain authorization under section 271(d)(3)"). Inasmuch as section 10 expressly applies to section 251(c) as well as to section 271, the BellSouth Order demonstrates there is no sound policy authority which permits the Commission to forbear from applying section 251(c) to an in-region data affiliate simply because it complies with section 272.

• The NPRM needs to examine the assumption that the prices for UNEs and OSS provided by an incumbent to its affiliate will automatically be fair and reasonable. In particular, the NPRM needs to ask how to evaluate the reasonableness of "volume" prices which only the incumbent's affiliate can employ. Furthermore, in the presence of price caps and the absence of appreciable outside ownership in a data affiliate, the NPRM should inquire whether an incumbent's charges to its affiliate are simply a wash, and whether the effect of an incumbent charging unreasonable rates to its affiliate's competitors would in fact benefit the incumbent's bottom line while unfairly hindering its affiliate's competitors.

• The availability of data-capable loops is an important strategic factor in successfully entering the high speed loop market. Because loops not exceeding a certain length and without loading coils or bridge taps, are required in order to provision high-speed loop services, knowledge about the location of these data-capable loops is extremely valuable to potential entrants in this market. The NPRM needs to assess how the Commission can insure that the affiliate does not have special access to this information. It also should inquire into effective deterrents the Commission could apply if violations occur.

• Given that section 272 and the Non-Accounting Safeguards Order have little application to an incumbent's entry into high-speed loop services via a separate subsidiary, the NPRM contemplated by the incumbents needs to examine what rules should apply concerning issues such as: transfers of employees; transfers of brand names; transfers of customers; use of CPNI; facilities sharing; the implications of product bundling by the affiliate through resale; etc.

• It has been suggested that forbearance for an in-region data affiliate should be linked to the incumbent's compliance with certain pro-competitive requirements. Given the long history of the incumbents' success in delaying or avoiding similar requirements in the past, and the fact the Commission's new "rocket docket" complaint procedure remains untried, an NPRM needs to ascertain how the Commission would insure that competitors actually receive critical services and facilities such as: data-ready loops; cageless collocation; data interconnection; access to effective OSS; etc.

• Our understanding is that the incumbents' proposed forbearance from resale of

high speed loop services provisioned via a section 272 subsidiary is predicated on competitors' asserted ability to install their own electronics (such as "DSLAMs") in central offices and remote pedestals, even though NTIA has concluded that the resale requirement should continue to be applied in such a situation (NTIA ex parte letter filed July 17, 1998). Because the installation of a competitive DSLAM provides the best demonstration that competitors are actually able to install such equipment, an NPRM should ask whether it is desirable to limit forbearance from resale to those serving areas where a certain level of competitive DSLAMs already exist. Such a requirement might motivate the incumbents to cooperate, at least initially, in the installation of competitive DSLAMs.

The Continuing Uncertainty Concerning the Current Requirements of Section 272 as Well as the Non-Accounting Safeguards Order - The need for an adequate rulemaking inquiry is amplified by the fact that the understanding of the Commission and the industry concerning the specific requirements of section 272 and also the Non-Accounting Safeguards Order is uncertain at best. As the DC Circuit remarked in rejecting an appeal from the Commission's first implementation of this provision: "This case arises from a challenge to an Order of the Federal Communications Commission ... construing a poorly drafted section of the Telecommunications Act of 1996, enacted as 47 U.S.C. § 272" (Bell Atlantic v. FCC, 131 F.3d 1044 (1997); emphasis supplied). The ambiguities of this section, as well as the Commission's implementing order, are also underscored by the current dispute between AT&T and Ameritech concerning the joint marketing portions of the Non-Accounting Safeguards Order (File E-98-41).

The Asserted Need for "Interim Relief"- Given our willingness to aid the Commission in obtaining expedited comments and replies on an NPRM, we see no practical need for the Commission to allow the incumbents any form of "interim relief." Furthermore, any grant of interim relief would, we submit, constitute poor policy, as well as implicate the legal issues raised above. As the BellSouth Order and the litigation between AT&T and Ameritech over the joint marketing of long distance service amply demonstrate, there is currently no clear understanding of the specific requirements of section 272 and its implementing order. Consequently, there is no way for the Commission to predict authoritatively how the incumbents would actually attempt to implement such an interim grant of authority.

If the Commission remains persuaded that interim relief is necessary and legal,

contrary to our own views, it should require that any incumbent wishing to take such action in advance of a final rulemaking order would first have to obtain approval by the Commission through the filing of a compliance plan. Such a plan would have to include, though not necessarily be limited to, a demonstration that the incumbent were already in compliance with all the requirements proposed by the Commission for its final rules, as well as with the basic proposals contained in ALTS' section 706 petition and in specific separate subsidiary requirements proposed by various parties.

The Commission Should Be Careful Not to Issue Any "Interpretation" of Section 272 that Precludes It from Overseeing the Incumbents' Implementation - Given the uncertainties recited above, the Commission must take particular care not to take precipitous action at this time that would potentially limit its ability to address these concerns. If the Commission were to issue a legal interpretation of section 272 holding that section 272 itself authorizes the incumbents to implement in-region data affiliates, the incumbents might well start implementing their in-region affiliates without complying with, or even acknowledging, any of the many pro-competitive matters (such as cageless collocation, data-ready loops, etc.) the Commission appears to believe should accompany the creation of such an affiliate (and which NTIA believes should precede the creation of such an affiliate). Accordingly, the Commission in an NPRM needs to take care not to craft an interpretation of section 272 which precludes it from later policing or correcting the incumbents in the event they choose an implementation approach -- particularly, an anticompetitive approach -- that the Commission never intended.

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The competitive industry shares your desire to see high speed loop services made available for all Americans as quickly as possible, and we agree that competition remains the best way to accomplish this important goal. Please let us know if we can provide you with any additional information on this important topic.

Sincerely yours,

Russell Frisby
Russell Frisby
President, Competitive
Telecommunications Association

Heather Burnett Gold
Heather Burnett Gold
President, Association for Local
Telecommunications Services

cc:
Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Harold Furtchgott-Roth
Commissioner Michael Powell
Tom Power
Jim Casserly
Paul Gallant
Kevin Martin
Kyle Dixon
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Blaise Scinto
Kathryn Brown
Larry Strickling
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